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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 55

LAWRENCE B. GOLDSMITH, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

Petition of Lawrence B. Goldsmith for Rehearing

To the Honorable the Chief Justice of the United States and to the Honorable the Associate Justices of the Supreme Court of the United States:

Your petitioner, Lawrence B. Goldsmith, respectfully prays that a rehearing be granted as to him. In support of his prayer your petitioner respectfully shows:[1]

1. Quoted matter is from the Court's opinion, unless otherwise indicated.

This petition considers only the aspects of the case which affect petitioner. The filing of a petition for rehearing in a matter which has resolved itself into a determination of what inferences are *legally* permissible,[2]—not only what inferences "a rational, well constructed mind can reasonably draw" (*Jannin v. London etc. Bank*, 92 Cal. 14, 27), but as well what inferences a jury is to be permitted to draw in the light of the Government's burden of proof[2] and the presumptions, notably that of innocence, to be overcome,—is approached with diffidence. The matter is usually one of sound judgment.[0] Normally, no mechanical yardstick gives the measure by which it can be said that the presumption of innocence has, or has not, fairly been overcome. Realization of the difficulty, at this stage of the case, might dictate submission to the Court's judgment were it not that there are contrary considerations which seem compelling,—at least to advocates who have tried to disassociate themselves from the prepossessions with which they went into defense of the case.

The short of our position is that the judgment has permitted itself to be overwhelmed by inadmissible admissions,—inadmissible because without fair foundation; that these admissions have been permitted to have anticipatory effect and to give persuasiveness to the argument for such foundation to the point, in practical effect, of supplying it, although, until that foundation was firmly set on its own bottom, the admissions were not entitled to any consideration. It is submitted, with deference, that the admissions have worked the improper influence that the Court recog-

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2. Cf. *Patton v. Texas & P. R. Co.*, 179 U.S. 658, 45 L.ed. 361; *Penn. R. Co. v. Chamberlain*, 288 U.S. 333, 77 L.ed. 819; *Mortensen v. United States*, 322 U.S. 369, 374, 88 L.ed. 1331, 1335.

nizes is a danger with fallible jurors; that the opinion has not shaken their effect when considering,[3] as to Goldsmith, the basic question whether independently of the admissions there was proof of the *corpus delicti*—as to Goldsmith, his connection with a conspiracy, real or supposed.[4]

Concededly, as to Goldsmith, there are only two circumstances to support what is, with a deference, the pyramiding of inference upon inference in the face of the rule that a conviction must be taken beyond the realm of guess, speculation and reasonable doubt. The opinion recites the objective aspects of Goldsmith's transaction from the ordering and receipt of the whisky, payment for it, sale of it and receipt by Francisco of $24.50 per case, its selling price, and says: "Thus far no illegal act, transaction, intent or agreement appears." Indeed, the government, and the opinion, strain to make some virtue of this by arguing the regularity of Goldsmith's objective conduct against him; by arguing that the "innocent appearing actions" of Goldsmith "were the crux of the conspiracy"! To this are then added two major circumstances: (1) admissions that Francisco did not own the whisky,[5] taken to show something sinister and (2) overceiling transactions with the whisky by three men though "the evidence does not show that any of these last three

3. Not expressly, of course. But the use of the admissions presupposes such consideration.

4. As to *him* the corpus delicti is a conspiracy to which *he* was a party, not some different conspiracy. In conspiracy the connection is the gist of the offense. *Morrison v. California*, 291 U.S. 82, 92, 78 L.ed. 664, 671.

5. We assume, for purpose of endeavoring to meet the opinion, that they go this far.

was connected with Francisco in any way except that each had part in arranging sales and deliveries of" some of the whisky, taken to supply the precise sinister purpose and agreement required for criminal conspiracy.[6]

The opinion abundantly demonstrates the force of the claimed admissions, if they can be considered. Not only in the order of steps taken are they first used to show that Goldsmith was not the owner of the whisky and therefore must have been a party to some unholy alliance, without which there was no improper scheme for anyone to join, but the opinion itself characterizes them. They are said to be "important admissions" which "give rise to the crucial problems in the case"; **they "alone disclose the unknown owner's existence;**[7] that Goldsmith and Weiss were acting for him, not for themselves; * * *; and gave the use of Francisco's name to cover up the unknown owner's existence, identity and part in the scheme"; "they supply strong confirmatory or supplementing proof to show, not only the connection of Goldsmith and Weiss with the scheme, but also its existence and illegal character"; their effect was such that if improperly received as to the other defendants "reversal would be required" because even if the evidence was sufficient without them "they were of such importance that if admitted improperly the jury might have drawn entirely different inferences from the whole evidence including them than from it without them." Even in the result reached the opinion concedes

6. *Wong Tai v. United States*, 273 U.S. 77, 81, 71 L.ed. 545, 548.

7. An essential of the corpus delicti, on the Government's theory, and here conceded to be without independent proof or corroboration.

that without them the evidence as to Goldsmith "becomes not so compelling." Their effect was such that even when admitted as to two defendants only, and with the jury carefully instructed they could not be used against the other defendants, there was danger that the jury "would transfer, consciously or unconsciously," their effect to the other defendants. "That danger was real." If there was danger that the other defendants would be overwhelmed by the admissions it was, of necessity, greater as to Goldsmith. Although not entitled to be considered against him until otherwise a case was made, the admissions, except by the exercise of the utmost judicial restraint, were bound, and, with deference, were permitted, unconsciously to color circumstances otherwise neutral.

No question is made of the rule that admissions were not entitled to be received or considered against Goldsmith until without them a case against him fairly had been made. (*Warszower v. United States*, 312 U.S. 342, 85 L.ed. 876; *Isaacs v. United States*, 159 U.S. 487, 40 L.ed. 229; *Tabor v. United States*, 152 F.2d 254, 257 (C.C.A. 4); *Forte v. United States*, 68 App. D.C. 111, 94 F.2d 236.) No statement by Goldsmith or in his presence was part of any transaction under consideration,—was part of the *res gestae*. The admissions were "not made in execution of the common design, * * * some of them because made after termination of the conspiracy, others because they had no effect to forward its object. None were made in furtherance of the conspiracy's object."

The Government's case as to its sufficiency against Goldsmith (though not, perhaps, as to its persuasiveness if otherwise sufficient) must rest on the same evidence as the

case against the other defendants, considered in Part III of the Opinion. **In this aspect it is a case of a wholesaler selling his own whisky.**

In this aspect **Francisco** bought, received and paid for whisky, **sold its own whisky** and received its sales price for the whisky, "no illegal act, transaction, intent or agreement" appearing, other than that persons "not shown" to be "connected with Francisco in any way," except that they arranged sales of this whisky, received side payments which brought the purchaser's price over the ceiling.[8] "It was not brought out with what person or persons" these persons dealt in securing the whisky and it is not shown that they had any direct dealing with Francisco or Goldsmith. To this there is one exception. Figone testified that he went to Francisco's place of business, but the opinion somewhat understates the evidence when it says that he "could not identify the person with whom he dealt." His evidence went beyond this. It was, affirmatively, that the person **was not Goldsmith**. The evidence did not show that Francisco received anything beyond its sales price of $24.50.[9]

What, then, is the basis for an inference of guilt of conspiracy as to Goldsmith, the admissions, thus far inadmissible, aside? With deference, by a process of cutting and patching a series of minor circumstances are used in the attempt to show that Goldsmith, selling his own whisky, must have known that there was some intermediary who was receiving something, that the difference

8. See text at note 7 above.

9. This is in effect conceded when it is said that "it was a matter of indifferent detail to the salesmen * * * that Goldsmith and Weiss were receiving and splitting only the $2 per case."

between $24.50 per case and the ceiling was so small that he must have known this something would bring the purchaser's price above the ceiling, and that unless this were the situation he would not have sold below the ceiling.

The last circumstance is colorless. If Goldsmith did know someone was receiving payment beyond his sales price and that it must bring the purchaser's price above the ceiling, this was no reason for *him* to sell his whisky *below* the ceiling. If the tavern owner was to pay more than the ceiling price there was every reason why Goldsmith should sell up to the ceiling. In fact he did sell 2465 cases below the ceiling with no side payment to anyone! The real reason he sold below the ceiling was that the ceiling varied. It depended on three factors, one of which was a variable, the freight. The ceiling was arrived at by applying a formula. It was 115% of the distiller's price, plus freight, plus state tax. It is assumed that the ceiling was the same for all of the whisky. It was not. If the exhibits in this Court (the freight bills) are examined it will be found that *the freight per case was not the same for each of the two cars and that the ceiling was not the same for both carloads of whisky.* This whisky was contracted to be sold, as the opinion points out, before it arrived in San Francisco *and before Goldsmith could know what the freight was.* At best he could only estimate the ceiling and prudently fixed his price safely within it.

Aside from the admissions, the case against Goldsmith is made to turn upon the proposition that he and Weiss "knew the margin of legal profit left, whether for themselves or for others, after deducting the $24.50 per case

was only 77¢." But the opinion neglects to point out, with deference it can not be pointed out, how it can be inferred fairly that they knew anyone else was to receive a profit, unless the admissions are considered. There is nothing to indicate that they knew there were any intermediaries between them and the tavern owners or that if there were an intermediary he was acting for money rather than as an accommodation and from entirely proper motives. To the contrary, there is a compelling circumstance that points to want of such knowledge. This, it is believed, the Court has not given proper effect, although it has noticed it.[10]

The total of the two shipments of whisky ordered, received, paid for and disposed of by Francisco was 4040 cases. Of these 1575 at the most were shown to have been paid for by tavern owners at a price over the ceiling.[10] The exhibits in this case will show that Francisco reported to the Government, on forms required by the Government, the name and address of the receiver of each of the other 2465 cases. Those buyers were all located within the general San Francisco Bay Area; at places not as far distant as Cottonwood, from which Taylor and Humes came. As to sale of these 2465 cases no proof of illegality was made. Are we wrong in believing that the presumption of innocence, and the rule placing on the government the burden of proving what it intends to claim, operate to compel the conclusion that Goldsmith's dealings with these 2465 cases were entirely legitimate; that as to each of the 2465 there was no intermediary, or if there were an intermediary, there was none exacting side payment?

10. See note 1 of the opinion.

Goldsmith cannot be saddled with an inference that he knew that there was any payment for these 2465 cases, beyond the payment made to Francisco, **for there was none.** But if the inference cannot be drawn here it is not warranted as to the 1575. There is not a shred of evidence that **so far as Goldsmith was concerned** the dealings with the 1575 differed in any particular from the dealings with the 2465.[11] Yet, it is concluded that "innocent appearing actions" in acquiring and disposing of 4040 cases of whisky, exactly the same, so far as Goldsmith acted, for all of the 4040, and innocent in fact as to 2465, warrant an inference of his participation in a conspiracy to sell this whisky over the ceiling because it later developes that 1575 of the 4040 were illegaly dealt with by others, but with no more proof of Goldsmith's knowledge of the illegality than that all 4040 cases were handled by him in the same way,—by "innocent appearing actions"!

This is the significance of the fact that Goldsmith handled not 1575 cases but 4040 cases, all in exactly the same way: It precludes any sinister inference from the fact that Francisco sold at $24.50, below the assumed ceiling by 77¢ (see above). If this was all Francisco got for 2465 cases properly sold, what possible motive would Goldsmith have for "sticking his neck out" for no more, on improper sales when he could sell legitimately and easily in a time of shortage? The sale of the 2465 at $24.50 disposes of the suggestion (note 13 of the opinion) that it could be inferred that Francisco was "willing to make sales only because of an illegal agreement with the sales-

11. The same in every sense,—not merely in time, place and character, but the very same.

men to receive over-ceiling prices." And if it got only $2.53 profit per case in any event (see note 9 above) it had no interest in any "salesmen" or their existence. And where, **as to Goldsmith,** no more appears touching the 1575 that appears as to the 2465, the suggestion (opinion, note 13) that an inference of misconduct can be drawn because dealings were with "salesmen" with whom no prior dealings had been had and who were not regularly in the liquor business evaporates for there is no basis for an inference that Goldsmith knew anything about *any* "salesman,"—knew even of his existence.

We submit, with deference, that it is a startling result to hold that a series of objective acts, the **same**[11] for two series of transactions, one of which is legal beyond question, without more warrants the conclusion that the actor's part in the second series was criminal. If the conclusion is not warranted the showing is without more because the claimed admissions can not be considered.

These are the reasons which have impelled us to ask reconsideration for Goldsmith:

1. The admissions which have colored this whole case are entitled to no probative value, indeed, were not entitled to be received in evidence, until independently a case had been made against Goldsmith.

2. The circumstances said to warrant an inference, without regard for the admissions, that Goldsmith was a party to a conspiracy to sell whisky over the ceiling are exactly the same as to Goldsmith with respect to 2465 cases of the same whisky legitimately sold by him.

We respectfully submit that Goldsmith is entitled to the benefits of the rule of *United States v. Falcone,* 311 U.S.

205, 25 L.ed. 128. He was not required to accompany every case of whisky to its place of final rest behind a bar and to police its journey.

It is respectfully submitted that the cause, as to petitioner Goldsmith, warrants reconsideration.

Dated at San Francisco, California, January 9, 1948.

ARTHUR B. DUNNE,
WALTER H. DUANE,
Attorneys for Petitioner
Lawrence B. Goldsmith.

CERTIFICATE

The undersigned, counsel for petitioner Lawrence B. Goldsmith, certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ARTHUR B. DUNNE,
Attorney for Petitioner
Lawrence B. Goldsmith.